

Stefanakou (Migration) [2018] AATA 197 (2 February 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Fioroula Stefanakou
CASE NUMBER:	1701011
DIBP REFERENCE(S):	BCC2016/2804597
MEMBER:	Justin Owen
DATE:	2 February 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211 (2)(d)(ii) of Schedule 2 to the Regulations

Statement made on 02 February 2018 at 11:22am

CATCHWORDS

Migration – Partner (Temporary) (Class UF) visa – Subclass 820 (Partner (Temporary)) – Medical Treatment – Emotional state – Finances for lodgement – Misunderstanding of information – Attempts to hold a substantive visa

LEGISLATION

Migration Act 1958, s 65

Migration Regulations 1994, Schedule 2 cl 820.211, Schedule 3 Criterion 3001-3004

CASES

Babicci v MIMIA (2005) 141 FCR 285

Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 3 January 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 23 August 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2). The delegate found that the applicant was not the holder of a substantive visa at the time she lodged the partner visa application. The delegate considered the applicant's request to waive the Schedule 3 criteria, but after considering all the circumstances of the application, the delegate concluded there were not compelling reasons to waive the Schedule 3 criteria.
4. The applicant appeared before the Tribunal on 19 January 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and the applicant's son-in-law. The Tribunal hearing was conducted with the assistance of an interpreter in the Greek and English languages.
5. The applicant was represented in relation to the review by the sponsor. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in this case is whether the applicant meets the Schedule 3 criteria (as attached to this decision), and if not, whether there are compelling reasons for not applying them.
8. **Does the applicant meet Schedule 3 criteria, or should those criteria be waived?**
9. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
10. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

11. The applicant provided to the Tribunal a copy of the Departmental decision record. It indicates that the applicant entered Australia on a UD-601 visa on 10 April 2016. The visa ceased on 10 July 2016. On 30 June 2016 the applicant applied for a subclass FA 600 visa. This application was withdrawn on 5 July 2016. On 4 July 2016 the applicant applied for a subclass UB 602 medical treatment visa. The delegate refused the application on 3 January 2017. The applicant remains the holder of a bridging visa.
12. There is nothing before the Tribunal to indicate that the applicant held an entry permit that was valid up to and including 31 August 1994. There is nothing to indicate that the applicant became an illegal entrant before 1 September 1994. There is nothing to indicate that the applicant ceased to hold a criminal justice visa on or after 1 September 1994 or that she entered Australia unlawfully on or after 1 September 1994. There is nothing to suggest that the last substantive visa held by the applicant was cancelled and the Tribunal has made a decision to set aside and substitute the cancellation decision

CRITERION 3001

13. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
14. The Tribunal finds that the applicant last held a substantive visa on 10 July 2016 when her visitor visa expired. The Tribunal finds that that date is the 'relevant day' within the meaning of subclause 3001(2)(c)(i) of Schedule 3.
15. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

COMPELLING REASONS

16. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
17. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babici v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
18. The applicant in both oral evidence to the Tribunal and through her written submission claimed that the IVF fertility treatment she has undertaken with the sponsor represented a compelling reason for a waiver of the Schedule 3 criteria. An invoice from IVF Australia confirming that the applicant had undertaken a full IVF cycle in 2016 and 2017 was provided to the Tribunal. The applicant also submitted a statement of support from her treating doctor at IVF Australia Dr Graeme Hughes dated 24 August 2016.
19. The Tribunal enquired of the applicant why the treatment could not occur offshore. The applicant responded that the treatment was not as advanced in Greece.
20. The Tribunal accepts the applicant and sponsor have consulted a doctor about fertility treatment and have been undergone an IVF cycle. The Tribunal accepts that the applicant and sponsor would prefer to remain in Australia whilst undergoing such treatment. The

Tribunal also notes the age of the applicant and accepts that the proportion of women who experience infertility and miscarriage increases with age. The Tribunal however does not consider that the couple's desire to have children to be a compelling reason. It is common to many relationships. Importantly, the applicant has not satisfied the Tribunal that fertility treatment would not be available to her (either in her home country or in the future) unless the waiver is applied. The Tribunal is mindful that if this relationship is genuine, the applicant will be able to apply for a Partner visa offshore and any period of separation is likely to be temporary. In such circumstances, the Tribunal does not consider that the couple's plans to have children, including the arrangements they may have made or may make for any future fertility treatment, represent compelling reasons for the waiver.

21. The sponsor stated that the applicant's continued presence with him in Australia was crucial to him. The sponsor expressed concerns about how a forced long-term separation may adversely impact upon their relationship and that his family would 'fall apart' again. The Tribunal makes no assessment as to the nature of the applicant's relationship with the sponsor and has accepted at face value the claims made by the parties that they were, and continue to be, in a genuine relationship together and the circumstances of that claimed relationship for the purposes of this decision. In the Tribunal's view, separation is not uncommon among partners. The Tribunal also notes that if this relationship is genuine, the applicant will be eligible to apply for a Partner visa in the future and any period of separation is likely to be temporary. In the circumstances of this case, the Tribunal does not consider that the period of temporary separation gives rise to compelling reasons for the waiver.
22. The sponsor in his oral evidence referred to stated that he had previously suffered from and been treated for depression and anxiety. The sponsor related to the Tribunal that this had previously occurred some years previously when he was involved in a long-running international custody dispute with his former wife concerning their children. The Tribunal notes the medical documentation from Dr Portia Predny noting that the sponsor had a history of major depression and had been treated for this between 2006 and 2009. The sponsor stated that his anxiety had returned since the delegate had refused the partner visa application. Documentation was provided concerning visits to a clinical psychologist during 2017. The applicant expressed in oral evidence her grave concerns for the sponsor if she were to depart Australia. The sponsor's son in oral evidence that he didn't want to see their family 'ripped apart'. The Tribunal notes that emotional hardship can be considered a compelling reason for a waiver of the Schedule 3 criteria. No medical evidence was tendered however that supported the sponsor's claim that the companionship of the applicant was necessary in successfully addressing and alleviating these conditions.
23. The Tribunal furthermore is not convinced that emotional support can only be provided when the couple reside under the one roof. There is no reason why the same level of support could not have been provided if the applicant was to live and reapply for a partner visa outside Australia. That is, the Tribunal is not satisfied that the level of emotional support would be any different if the waiver is not applied. It is not unusual for couples to live separately for a period of time and that should not preclude the provision of emotional support, if this relationship was genuine. The Tribunal therefore does not consider these circumstances as justifying a waiver of the Schedule 3 criteria. The Tribunal does not consider the sponsor's claimed emotional state as a compelling reason for exercising the waiver of Schedule 3 requirements and gives no weight to this element of the claim.
24. The applicant tendered a number of documents concerning a new business that had been recently established by the sponsor – the Greek Vegan Bakery located in Revesby, NSW. The business signed a three year lease for premises on 1 October 2017. The Tribunal notes that the business is operating six days a week with a strong profile on social media as Australia's first Greek vegan bakery. Company extracts from the Australian Securities and Investments Commission (ASIC) were also provided illustrating the fact that the sponsor and

applicant were co-directors of the company. The sponsor and the sponsor's son (who also claims to work at the bakery) spoke of the important role the applicant plays at this new business. The sponsor noted that the business owes \$120,000 and the applicant is a vital part of the equation in seeing the business become successful. The Tribunal sympathises with the sponsor as he attempts to build a new small business in the highly competitive food and hospitality sector. The Tribunal accepts that the applicant plays an important role in assisting him with this new business. However, the Tribunal is mindful that the applicant is applying for the Partner visa. It is not an employment visa and is not based on her employment and the assistance she provides to the sponsor's business. The Tribunal is not convinced that the role the applicant plays at the sponsor's business constitutes compelling reasons for the waiver and therefore gives this claim no weight.

25. The fact the applicant has a 16 year old daughter in Greece that also wishes to migrate permanently to Australia was raised by the applicant and sponsor as a compelling reason for a waiver of the Schedule 3 requirements. It was submitted to the Tribunal that she is being precluded from studying at school due to her mother's migration status. The Tribunal gives this claim no weight. The Tribunal notes that the applicant's daughter has been in Australia during 2017 and returned to Greece to live with her father over the holiday break. The Tribunal notes that the applicant and sponsor claimed to have lived together in Greece before coming to Australia. The applicant's daughter is living it is claimed with her father whilst back in Greece. There is no evidence that the current situation concerning the applicant's visa is affecting the applicant's daughter's education. The Tribunal therefore gives this claim no weight.
26. The sponsor and the applicant each raised as a compelling reason the length of their relationship together. The sponsor drew the Tribunal's attention to the delegate's decision to refuse the application. Relevantly, the delegate wrote that a long-standing partner relationship was considered to be 2 years.
27. The Tribunal however notes that the criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). Accordingly, simply the fact that the parties are in a genuine and continuing relationship is not of itself a compelling reason for not applying the Schedule 3 criteria as it is already a criteria which must be satisfied in order to meet the criteria in cl.820.211(2)(a). If the relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship.
28. Thus, as a genuine spousal relationship is the basic requirement for a partner visa application, the Tribunal is not satisfied that the genuineness, mutual commitment, emotional support, continuing nature and longevity of the parties' relationship or the parties' temporary separation are on their own, circumstances that should compel the Tribunal to not apply the Schedule 3 criteria. The Tribunal is not satisfied on the evidence that these are compelling reasons not to apply the Schedule 3
29. The Tribunal is mindful that the Explanatory Statement, in providing examples of compelling reasons, states: where the applicant and his or her nominator are already in a long-standing relationship which has been in existence for two years or longer... In these circumstances, waiver **may** be justified by the hardship which could result if the Schedule 3 criteria were not waived (Tribunal's emphasis).

30. The Tribunal is required to apply the legislation which states that it must be satisfied there are compelling reasons for not applying the Schedule 3 criteria. As is stated in *SZOMP v MIBP FCAFC 69* at paragraph 14; Context, such as legislative history or extrinsic materials, is a guide to the meaning of the statute but it “cannot displace the meaning of the statutory text” and it is the meaning of the statutory text which is where the task of statutory construction begins and ends: *Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2013) 250 CLR 503, 519*.
31. The Explanatory Statement and any guidelines produced by the Department do not provide criteria which, if met, satisfy the requirements of the legislation. If the nature of the relationship between the applicant and the sponsor were to be a compelling reason for not applying the Schedule 3 criteria, all the factors of the relationship, including its duration, the level of financial and emotional commitment, the dependence the parties had upon each other and other relevant factors must be considered. As it is made clear in the Explanatory Statement, the examples provided only may justify the waiver of the Schedule 3 criteria. They do not provide a criterion that, if satisfied, becomes a compelling reason for not applying the Schedule 3 criteria and the Explanatory Statement is not part of the statutory text which is to be considered.
32. The Tribunal also acknowledges that the earlier Departmental policy which identified long term relationships as giving rise to compelling reasons but in the Tribunal’s view, such policy is more restrictive than, and not consistent with the legislation.
33. In the circumstances of this case, the Tribunal does not consider that the existence of a long term genuine relationship between the applicant and the sponsor, even if one was established, constitutes a compelling reason for the waiver.
34. The applicant submitted the circumstances surrounding how she came to be without a substantive visa represents a compelling reason for a waiver of the Schedule 3 requirements. It is this issue that the Tribunal has particular sympathy for and submits the applicant has raised arguments that it considers compelling enough to exercise a waiver of the Schedule 3 criteria
35. The applicant and the sponsor submitted to the Tribunal that the applicant only fell afoul of the Schedule 3 criteria due to various misunderstandings with the Department whilst attempting to renew the applicant’s substantive visa. It was submitted that the applicant was extending her tourist visa and in her paperwork admitted that she was planning to receive medical treatment whilst in Australia – this was the preliminary treatment for the IVF cycle she undertook later that year. (T1, Folio 94). The applicant and sponsor state that they were then contacted by the Department on 1 July 2016 who recommended that the applicant withdraw her application for an extension of her tourist visa and apply for a medical treatment visa.
36. The sponsor spoke in some detail concerning these conversations to the Tribunal. He submitted as evidence email that he had sent to the Department at 12.20am on 2 July 2016 withdrawing the applicant’s application for an extension of her tourist visa. In the email to the Department it stated *‘After our telephone conversation this morning we would like to withdraw the application for extension of tourist visa’*
37. The Tribunal notes that at the time the applicant applied for an extension of her tourist visa she was the holder of a substantive visa. Whilst there is no conclusive evidence – given these were telephone conversations - before the Tribunal to confirm the Departmental officers did recommend or inform the applicant and sponsor that she should withdraw the application to renew her tourist visa, the Tribunal notes the time, date and content of the email of the sponsor to the Department. The email specifically refers to withdrawing the

tourist visa renewal on the basis of the conversation the applicant has had with the officer. The Tribunal on balance considers that it is plausible that the applicant and sponsor did come to this understanding on the basis of their conversation with the Departmental officer.

38. The Tribunal notes that the tourist visa application was withdrawn and a subclass 602 medical treatment visa application made on 4 July 2016. Upon discovering that was not the appropriate visa the applicant withdrew this application on 26 July 2016. The Tribunal notes at this time she still met the Schedule 3 criteria.
39. The Tribunal questioned the applicant and the sponsor why, at this time, they did not lodge a Partner visa application and subsequently meet the Schedule 3 criteria. They responded that they did not procure the finances needed to make a Partner visa application until the following month. By the time they lodged the Partner visa application they were around two weeks beyond meeting the Schedule 3 criteria.
40. The Tribunal notes that on the evidence the applicant made genuine and consistent attempts to remain the holder of a substantive visa. The Tribunal has placed some weight on the email of the sponsor to the Department specifically referring to their previous conversation and withdrawing the renewal of the applicant's tourist visa. The Tribunal considers it plausible that the applicant and sponsor did find it challenging – in the little time they had remaining to meet the Schedule 3 criteria after withdrawing the medical treatment visa – to obtain the finances necessary for the lodgement of their partner visa application.
41. The Tribunal has found this a challenging review. The Tribunal is mindful that information about Australia's visa system is readily available on the Department's website and from any Immigration office or a migration agent. The Tribunal also notes that Departmental officers explain rather than specifically advise applicants on the lodgement of visa applications. The Tribunal is also of the view that it is encumbered upon the applicant to avail themselves of the correct information. Nevertheless the Tribunal has accepted on the facts that there were conceivably a number of misunderstandings that eventually resulted in the applicant lodging this Partner visa application a short period of time outside of the Schedule 3 criteria. The Tribunal also notes that the applicant has remained lawful and did make repeated attempts to remain the holder of a substantive visa. On balance, the Tribunal considers that there is a compelling reason to waive the Schedule 3 criteria on this particular occasion.
42. At the review the sponsor urged the Tribunal to consider not only the Schedule 3 issues in this matter but also review whether the applicant and sponsor are in a genuine and continuing relationship both at the time of application and the time of decision. The Tribunal has declined to do so and has made a decision only on the Schedule 3 criteria. The Tribunal noted at the hearing to the applicant and sponsor that it considered that only very limited corroborative material has been provided by the applicant thus far concerning the financial aspects, social aspects, nature of the household and nature of the commitment of the purported relationship.
43. The Tribunal is satisfied on balance that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii).
44. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

45. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 (2)(d)(ii) of Schedule of Schedule 2 to the Regulations

Justin Owen
Senior Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

SCHEDULE 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.